Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

NOVATO FIRE PROTECTION DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA and
UNITED STATES COAST GUARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the federal government's constitutional immunity from state taxation requires a local government to provide free fire protection and emergency medical services to a federal facility that was "detached" (*i.e.*, deannexed) more than 20 years ago under applicable state law procedures?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Novato Fire Protection District ("NFPD") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 181 F.3d 1135. The opinion of the district court (App., *infra*, 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1999. A petition for rehearing was denied without opinion on September 21, 1999. App., *infra*, 23a. On December 6, 1999, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 20, 2000. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (1999).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl.2.

The Tenth Amendment to the U.S. Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const. amend. X.

California Code of Civil Procedure § 349.1 (West 1999) provides:

> The validity of any acts or proceedings taken under color of law for the formation, organization, incorporation, dissolution, consolidation, change of organization or reorganization of, or for any change in the territorial boundaries of, any city, county, city and county, special district, public corporation or

other public entity, or improvement district within any of the foregoing, shall not be contested in any action unless such action shall have been brought within six months from the date of completion of said acts or proceedings. Unless an action is commenced within said period all said acts or proceedings shall be held valid and in every respect legal and incontestable.

STATEMENT OF THE CASE

The Facts Giving Rise to this Case

The Novato Fire Protection District ("NFPD") is a local government agency that provides fire protection and emergency medical services to parts of Marin County, California. In the 1930s, the federal government acquired a large tract of land—commonly known as Hamilton Field—located within the boundaries of the NFPD. The federal government operated Hamilton Air Force Base on the land until 1974. From the time the Air Force Base was built until it was decommissioned in 1974, the federal government provided its own primary fire protection at Hamilton Field. App., *infra*, 2a. 13a.

When the U.S. Air Force reduced its operations at Hamilton Field in 1974, management of the facilities was transferred to the U.S. Navy. The Navy reduced the level of fire protection services provided by the federal government at Hamilton Field, and entered into a contract with the NFPD to provide primary fire protection and emergency medical services to the federal facility. App., *infra*, 2a.

In 1976, the NFPD applied to the Marin County Local Agency Formation Commission ("LAFCo") for permission to alter the NFPD's geographical boundaries to exclude Hamilton Field. This deannexation procedure is known as "detachment" under California law. In support of its application, the NFPD stated that requiring the NFPD to

provide free fire protection services to Hamilton Field would "impose[] an intolerable burden upon the remaining property owners in the District." C.A. App. 25.

In February, 1977, LAFCo approved the detachment, and, consistent with California law, called for an election to confirm or reject the detachment. Following the submission of written objections from the Navy and the Air Force and a public hearing, voters approved the detachment by a vote of 3,949 to 943. In January 1978, the detachment was certified by the California Secretary of State. App., *infra*, 14a.

The federal government did not challenge the detachment within the six-month period provided by California law. *See* Cal. Civ. Proc. Code § 349.1 (West 1999). To the contrary, in early 1977 the *NFPD* filed an action in federal court in connection with the federal government's plan to remove fire fighting personnel from Hamilton Field. *Novato Fire Protection Dist. v. James W. Plumber, Secretary of the Air Force*, Civ. No. C-77-66-WTS (N.D. Cal.). In responding to the NFPD's action, the federal government represented to the court:

> If the Federal property is no longer within the boundaries of the local district, the local district is no longer obligated to service the Federal property. If not obligated to provide services, the District and the Federal agency may enter into a valid contract for services.

C.A. App. 95-96.[1]

For 20 years, the federal government entered into annual contracts with NFPD to provide fire protection and

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[1] After the detachment of Hamilton Field was completed and the parties entered into a contract for services, *Plumber* was dismissed by stipulation. C.A. App. 96

emergency services at Hamilton Field. The U.S. Coast Guard, which occupied a portion of Hamilton Field, received the benefits of these services. In 1996, however, when the Coast Guard took over the largest portion of Hamilton Field, it asserted that the federal government is entitled to receive free fire and emergency protection services from the NFPD. In support of that position, the Coast Guard argued that the 1976 detachment of Hamilton Field violated the Supremacy Clause, because it purportedly subjected the federal government to local taxation. App., *infra*, 18a.

Proceedings in the District Court

NFPD brought this action in state court seeking a declaration that it is not obligated to provide free fire protection and emergency medical services to Hamilton Field. The United States removed the case to federal court. It also filed a claim against the City of Novato, asserting that if the NFPD is not required to provide free services to Hamilton Field, then the City is obligated under California law to provide such services.[2]

On cross-motions for summary judgment, the district court held that the United States is not bound by California's six-month statute of limitations for challenging the formation, dissolution, or change in the territorial boundaries of a local government entity. App., *infra*, 16a. In addition, the court concluded that, "[i]nequitable though it may seem, the Government's entering into contracts for the past twenty years . . . does not waive its right to challenge the detachment." *Id.* at 17a.

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[2] The NFPD agreed to continue providing fire protection and emergency medical services to Hamilton Field during the pendency of this litigation, provided that the federal government makes payments for the services into an escrow fund. App., *infra*, 14a n.1.

The district court next rejected the federal government's argument that the detachment violated the federal government's immunity from state and local taxation. The district court held that "the detachment does not have the compulsory character of a tax" and therefore "did not violate the Supremacy Clause." *Id.* at 18a. The district court went on to hold, however, that the detachment was invalid under state law, because (1) the federal government filed written protests representing more than 50 percent of the assessed value of the land to be detached; and (2) the votes of residents within the area to be detached were not tallied separately from those outside the area to be detached.[3] Accordingly, the district court entered summary judgment for the federal government.[4]

Proceedings in the Court of Appeals

The Ninth Circuit declined to consider the federal government's claims under state law, thus implicitly recognizing that they could not support the district court's

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[3] As to the "50 percent" protest requirement, the district court acknowledged that the relevant California statute was amended in 1977 to require a written protest by 50 percent of the *voters*, without regard to their percentage of property ownership, *see* App., *infra*, 19a-20a, after similar provisions had been held unconstitutional, *see Curtis v. Board of Supervisors*, 501 P.2d 537 (Cal. 1972); *Levinsohn v. City of San Rafael*, 40 Cal. App. 3d 656, 115 Cal. Rptr. 309 (1974). As to the "[s]eparate [t]ally" requirement, the district court acknowledged that the relevant California statute was "ambiguous," cited no authority to support its interpretation, and rejected a state appellate court's contemporaneous view that detachment could be confirmed "by an election in the entire district." *Id.* at 20a-21a (rejecting *Simi Valley Recreation & Park Dist. v. Local Agency Formation Comm'n of Ventura County*, 51 Cal. App. 3d 648, 676, 124 Cal. Rptr. 635 (1975)).

[4] The district court dismissed as moot the federal government's claim against the City of Novato.

decision. App., *infra*, 11a; *see Department of Commerce v. United States House of Representatives*, 119 S. Ct. 765, 779 (1999) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.") (*quoting Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944), *and citing Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)). The court of appeals similarly declined to decide whether claims under state law are subject to California's six-month statute of limitations. App., *infra*, 12a n.7. Instead, the Ninth Circuit affirmed the district court's decision based solely on the constitutional argument, rejected by the district court, that the detachment of Hamilton Field from the NFPD violated the federal government's immunity from state and local taxation. App., *infra*, 5a-10a.

The Ninth Circuit recognized that "the District never attempted to directly assess taxes from the United States." App., *infra*, 5a. But the court nevertheless held that the contractual payments were "equivalent to a theoretical property tax" because they were "based not upon the actual cost of services to Hamilton Field, but rather upon the value of the property in question." *Id.* at 5a-6a. The court of appeals further held that the detachment of Hamilton Field from the NFPD violated the Supremacy Clause of the Constitution because "[t]he intent of the detachment action was to circumvent inter-governmental tax immunity by removing the District's pre-existing duty to provide core government services." *Id.* at 7a.

REASONS FOR GRANTING THE WRIT

More than 20 years ago, the NFPD invoked the procedures established by California law to alter its boundaries. Following a public hearing and an election, the appropriate state authorities recognized and approved the detachment of Hamilton Field from the NFPD. The federal

government did not seek judicial review of the detachment within the six-month period provided by state law. For 20 years thereafter, the federal government entered into annual contracts with the NFPD to provide fire protection and emergency services to Hamilton Field.

Despite this history, the Ninth Circuit held that the Constitution imposes on the NFPD an open-ended obligation to provide free fire protection and emergency medical services to Hamilton Field, and invalidates – decades after the fact – a change in the NFPD's boundaries pursuant to California law. The Ninth Circuit's decision goes far beyond the narrow confines of the federal government's immunity from state taxation established by this Court's decisions, and directly conflicts with the principles on which those decisions are based. Indeed, the Ninth Circuit's decision raises a serious issue of federalism, by allowing the Executive Branch of federal government to conscript state and local officials into its service, at no cost to itself and without authorization from Congress.

I. The Ninth Circuit's Decision Conflicts With Decisions Of This Court Narrowly Confining Federal Immunity From State Taxation To Direct Levying Of Taxes Upon The Federal Government.

1. This Court, speaking through Chief Justice Marshall, recognized the doctrine of federal immunity from state taxation in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Declaring that "the power to tax involves the power to destroy," *M'Culloch* invalidated a state tax on the Bank of the United States. *Id.* at 431. Subsequently, the Court embarked on a course of expanding the federal government's tax immunity to cover, among other things, state taxes on the income of federal employees, *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842), on income derived from property leased from the federal government, *Gillespie v. Oklahoma*, 257 U.S. 501 (1922), and on sales to the United

States, *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928).

"Shortly after reaching its zenith in the *Gillespie* decision," however, "the doctrine of intergovernmental tax immunity started a long path in decline and has now been 'thoroughly repudiated' by modern case law." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 174 (1989) (*quoting South Carolina v. Baker*, 485 U.S. 505, 520 (1988)). In the *Panhandle Oil* case, Justice Holmes, joined by Justices Brandeis and Stone, wrote in dissent: "The power to tax is not the power to destroy while this Court sits." 277 U.S. at 223. Justice Frankfurter commented that "[t]he web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen." *Graves v. People of New York ex rel. O'Keefe*, 306 U.S. 466, 490 (1939) (Frankfurter, J., concurring).

The Court soon recognized that its decisions expanding the federal government's immunity from state taxation "were increasingly divorced both from the constitutional foundations of the immunity doctrine and from 'the actual workings of our federalism.'" *United States v. New Mexico*, 455 U.S. 720, 731 (1982) (*quoting Graves*, 306 U.S. at 490 (Frankfurter, J., concurring)). The Court's decision in *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937), "marked a major change in course." *New Mexico*, 455 U.S. at 731. In *James*, the Court upheld a state tax on a contractor providing services to the federal government. In subsequent cases, the Court dramatically cut back on the scope of the tax immunity doctrine. *See Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 386-87 (1938) (overruling *Gillespie* and holding that the federal government may tax income derived from a state lease); *Graves*, 306 U.S. at 486-87 (overruling *Dobbins* and holding that a state may tax the income of federal employees); *Alabama v. King & Boozer*, 314 U.S. 1 (1941)

(overruling *Panhandle Oil* and holding that a state may tax sales to the United States).

The Court's more recent decisions hold that "tax immunity is appropriate in only one circumstance": where a State "lay[s] a tax 'directly upon the United States.'" *New Mexico*, 455 U.S. at 733, 735 (*quoting Mayo v. United States*, 319 U.S. 441, 447 (1943)). The Court has emphasized that "the limits on the immunity doctrine are . . . as significant as the rule itself." 455 U.S. at 734. "[I]mmunity may not be conferred simply because [a] tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy." *Id.* Such considerations are, in fact, "constitutionally irrelevant." *Id.*

The Court's "narrow approach" to the federal government's immunity from state and local taxation "comports with the principal purpose of the immunity doctrine, that of forestalling 'clashing sovereignty,' *M'Culloch v. Maryland*, 4 Wheat., at 430, by preventing the States from laying demands directly on the Federal Government." *New Mexico*, 455 U.S. at 735. The Court has acknowledged that the doctrine of federal immunity from state taxation has been so narrowed by modern judicial decisions that it "has taken on essentially symbolic importance." *Id.*[5]

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[5] The Court has observed that "[o]ne could, and perhaps should, read *M'Culloch* . . . simply for the principle that the Constitution prohibits a State from taxing discriminatorily a federally established instrumentality." *New Mexico*, 455 U.S. at 733 (*quoting First Agric. Bank v. State Tax Comm'n*, 392 U.S. 339, 350 (1968) (dissenting opinion)). Given the long history of the doctrine, however, the Court has narrowed the immunity to its current "essentially symbolic" dimensions rather than doing away with it entirely. *Id.* at 735.

In *Washington v. United States*, 460 U.S. 536, 541 (1983), the Court applied these principles to hold that an action of state or local government may not be held unconstitutional on the ground that it "circumvent[s] the Federal Government's tax immunity." The Court has thus squarely rejected the rationale relied on by the court of appeals in this case. *Compare* App., *infra*, 7a ("The intent of the detachment action was to circumvent inter-governmental tax immunity.").

In *Washington*, the state legislature imposed a sales tax on landowners who purchased construction work from a contractor. Because of the federal government's tax immunity, the sales tax could not be applied to construction purchased by the federal government. The state legislature acted to eliminate the federal government's tax exemption by imposing a sales tax on materials purchased by contractors doing construction work for the federal government. The Court rejected the "principal argument" of the United States, that the tax on federal contractors was invalid because it "circumvented the Federal Government's tax immunity." 460 U.S. at 541; *see also id.* at 543 n.9. In so holding, the Court recognized that a state or local government is permitted to "accommodate[] for the fact that it may not impose a tax directly on the United States." *Id.* at 546.

Just last Term, the Court reaffirmed the narrow scope of federal immunity from state taxation recited in *Washington* and the other cases of the last 60 years, and declined to extend the immunity "beyond the tight limits this Court has set." *Jefferson County, Alabama v. Acker*, 119 S. Ct. 2069, 2077 (1999); *see also Arizona Dep't of Revenue v. Blaze Constr., Inc.*, 119 S. Ct. 957, 959 (1999) (immunity confined within "narrow constitutional limits").

2. The Ninth Circuit's decision sweeps far beyond the narrow limits of the federal immunity from state taxation established by this Court's decisions, and directly conflicts

with the principles upon which those decisions are based. As both courts below recognized, the NFPD did not "lay a tax 'directly upon the United States.'" *New Mexico*, 455 U.S. at 733. "[T]he standard definition of a tax" for purposes of the federal government's immunity from state taxation is "'an *enforced* contribution to provide for the support of the government.'" *United States v. State Tax Comm'n of Miss.* 421 U.S. 599, 606 (1975) (*quoting United States v. La Franca*, 282 U.S. 568, 572 (1931)) (emphasis added). The "enforced" nature of the contribution is an essential attribute of a tax. "[F]ailure to pay a tax results in civil and sometimes criminal penalties." *United States v. City of Columbia, Mo.*, 914 F.2d 151, 155 (8th Cir. 1990). *See also United States v. City of Huntington, W.Va.*, 999 F.2d 71, 73 n.4 (4th Cir. 1993) (a tax is "[a]n involuntary pecuniary burden" that is "[i]mposed by, or under authority of the legislature . . . [u]nder the police or taxing power of the state"), *cert. denied*, 510 U.S. 1109 (1994); *id.* at 74 (Taxes are "enforced contribution[s] for the support of government," rather than "payments given in return for a government-provided benefit.") (quoting *LaFranca*, 282 U.S. at 572).

As the district court held and the court of appeals nowhere disputed, the NFPD's actions lack "the compulsory character of a tax." App., *infra*, 18a. The NFPD never attempted to extract an enforced contribution from the federal government. To the contrary, by detaching Hamilton Field the NFPD eliminated any possible basis under state law for exacting an involuntary contribution from the federal government. The federal government was free to arrange its own fire protection, continue with the NFPD, or with other fire fighting agencies in the area. As the Ninth Circuit expressly recognized, the NFPD "never attempted to directly assess taxes from the United States." *Id.* at 5a. Under this Court's decisions, the Ninth Circuit's analysis of the federal government's constitutional claim should have ended with that recognition. *See New Mexico*, 455 U.S. at 733 (federal

tax immunity applies only where a State "lay[s] a tax 'directly upon the United States'").

As noted above, the Ninth Circuit's decision also conflicts with this Court's decision in *Washington v. United States, supra*. The Ninth Circuit held that the detachment of Hamilton Field is unconstitutional because "[t]he intent of the detachment was to circumvent inter-governmental tax immunity." App., *infra*, 7a. That is directly contrary to this Court's express rejection of the proposition that actions intended to "circumvent[]" the federal government's tax immunity are unconstitutional, and to this Court's recognition that a state or local government is permitted to "accommodate[] for the fact that it may not impose a tax directly on the United States." *Washington*, 460 U.S. at 541, 543 n.9, 546.[6]

3. One of the reasons given by this Court for adhering to a narrow constitutional doctrine of federal immunity from state taxation is that "Congress can confer an immunity from state taxation." *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851 (1989) (citations omitted). The Court has concluded that if federal tax immunity "is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision." *New Mexico*, 455 U.S. at

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[6] The Court's opinion in *Washington* reiterated the rule that "'[s]o long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise.'" *Washington*, 460 U.S. at 540 (*quoting United States v. County of Fresno*, 429 U.S. 452, 460 (1977)). In this case, the NFPD has not levied any tax, and thus the question whether it has levied a discriminatory tax does not arise. In any event, the NFPD has not discriminated against the federal government. A state or local government "does not discriminate against the Federal Government and those with whom it deals unless it treats someone else better than it treats them." *Washington*, 460 U.S. at 544-45.

737. This is "wholly appropriate, for the political process is 'uniquely adapted to accommodating the competing demands' in this area.'" *Id.* at 737-738 (*quoting Massachusetts v. United States*, 435 U.S. 444, 456 (1978) (plurality opinion)). Thus, "absent congressional action . . . the States' power to tax can be denied only under 'the clearest constitutional mandate.'" *Id.* at 738 (*quoting Michelin Tire Corp. v. Wages*, 423 U.S. 276, 293 (1976)); *see also id.* ("[I]n contracting the once expansive intergovernmental tax immunity doctrine, we have recognized that the area is one over which Congress is the principal superintendent."); *Blaze Constr.*, 119 S. Ct. 960 (the taxation decision "rests . . . with the State of Arizona and with Congress"); *United States v. California*, 507 U.S. 746, 751 (1993).

Congress has not found it necessary to enact legislation to protect the federal government from state and local governments in connection with the provision of fire service. To the contrary, Congress has enacted legislation that is intended to protect state and local governments from the federal government. *See* 15 U.S.C. § 2210 (1999). Section 2210 provides for reimbursement to state and local government entities for the costs of fighting fires on federal property, to the extent that those costs are not already covered by "payments . . . to the fire service or its parent jurisdiction, *including taxes or payments in lieu of taxes*, the United States has made for the support of fire services on the property in question." 15 U.S.C. § 2210(b)(1) (emphasis added). Thus Congress, far from legislating to protect the United States from exactions by state and local governments, has expressly recognized the propriety of "taxes or payments in lieu of taxes" for the support of fire services on federal property. The Ninth Circuit's decision is thus flatly contrary to this Court's decisions holding that Congress is the "principal superintendent" of federal tax immunity, and that such questions should be left to "the political process," which

is "'uniquely adapted to accommodating the competing demands' in this area." *New Mexico*, 455 U.S. at 737 (citation omitted).

4. The Ninth Circuit reasoned that the contracts between the federal government and the NFPD were an unconstitutional tax because the amount that the federal government paid for fire and emergency services was based on an estimate of the assessed value of the property owned by the federal government, rather than on the cost of providing services to that property. App., *infra*, 5a-7a. This line of reasoning might have been appropriate if the NFPD had sought to extract an enforced contribution from the federal government. But the NFPD and the federal government entered into and annually renewed a voluntary agreement, and therefore the amount that the federal government agreed to pay is constitutionally irrelevant. As this Court held in a closely related context, "the Government's voluntary agreement to reimburse (or even fund in advance) . . . taxes" is of no constitutional significance. *United States v. California*, 507 U.S. at 753 (holding that the federal government's voluntary agreement to pay in full, and to fund in advance, state taxes levied on government contractors falls outside the federal immunity from state taxation).

The Ninth Circuit's decision bars state and local government entities from invoking the procedures established under state law for altering their boundaries, and imposes on state and local governments a constitutional obligation to provide free services to the federal government *ad infinitum*. In the hands of the Ninth Circuit, the federal government's immunity from state taxation has been transformed from a safeguard against the NFPD's hypothetical (and fanciful) power to destroy the federal government through taxation, into a very real power of the federal government to destroy local governments by demanding potentially unlimited

amounts of free services, without regard to whether the federal government's demand for these services "imposes an intolerable burden upon the remaining property owners" and taxpayers. C.A. App. 25. The Ninth Circuit's decision thus directly undermines the very basis of the intergovernmental tax immunity doctrine, which is "the need to protect each sovereign's operations from undue interference by the other." *See Davis v. Michigan Department of Treasury*, 489 U.S. 803, 814 (1989) (*citing Graves*, 306 U.S. at 481).[7]

II. The Ninth Circuit's Decision Raises A Serious Issue of Federalism.

1. The Ninth Circuit's decision not only oversteps the narrow boundaries of the federal government's constitutional immunity from state taxation, but also creates a serious constitutional issue by intruding on the basic operations of state and local government. In *Printz v. United States*, 521 U.S. 898, 909 (1997), this Court held that "the Federal Government may [not] command the States' executive power in the absence of a particularized constitutional authorization," even when Congress does so through explicit legislation. The Court based that holding on the "incontestible" proposition that "the Constitution established a system of 'dual sovereignty.'" *Id.* at 918 (*quoting Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991)). "[T]he Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise

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[7] In a prior case in which a local fire district declined to provide free fire protection services to a federal military base, the Comptroller General recognized that if the fire district took "action to have its boundaries changed to exclude the federal reservation," there "would be no question but that the district would have no obligation to furnish fire protection services to the federal property." 45 Comp. Gen. 1, 1965 WL 1676 at *3 (1965).

concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'" *Id.* at 919-20 (*quoting* The Federalist No. 15, at 109). *See also New York v. United States*, 505 U.S. 144, 161-66 (1992). Under our dual system, "'[t]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Printz*, 521 U.S. at 920-21 (*quoting* The Federalist No. 39, at 245). The Court concluded that that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States." *Id.* at 935.[8]

2. The Ninth Circuit's decision has precisely the effect of allowing the federal government to impress into its service, at no cost to itself, the officers of the NFPD. Under that decision, once a state or local government incurs an obligation to provide services to federal property located within its boundaries, it cannot avail itself of the means provided by state law to change those boundaries, but must continue providing free services for as long as the federal government demands them.

The federalism issue created by the Ninth Circuit's decision is particularly troubling because it disregards the role of Congress, which this Court has said is paramount in the area of federal tax immunity. Like *Printz*, the usual Tenth Amendment case arises after Congress has enacted legislation, thus affording the basis for an argument that

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[8] The Court made clear that local governmental entities, not just States, are fully "protected by the Constitution's guarantees of federalism, including the Tenth Amendment." *Id.* at 931 n.15 (citations omitted).

States "find their protection from congressional regulation through the national political process." *South Carolina v. Baker*, 485 U.S. at 512 (*citing Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537-54 (1985)). The Ninth Circuit's decision, in contrast, short-circuits the national political process (as well as upsetting the results of a state political process concluded more than 20 years ago).

In sum, the Ninth Circuit has intruded into the most basic operations of state and local government, resulting in precisely the "clashing sovereignty" that the intergovernmental tax immunity doctrine was intended to forestall. *M'Culloch*, 17 U.S. (4 Wheat.) at 430. The Ninth Circuit's decision is alien to the purpose and narrow limits of the federal immunity from state taxation, and conflicts with this Court's decisions interpreting and limiting the immunity. Far from protecting the federal government against the State's assumed "power to destroy" through taxation, the Ninth Circuit's decision confers on the federal government a wholly unwarranted power to burden or even destroy local government by asserting a constitutional entitlement to free government services.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,

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January 2000

APPENDIX A

NOVATO FIRE PROTECTION DISTRICT,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; U.S. COAST GUARD,

Defendants-Appellees.

No. 98-15441.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 9, 1999.

Filed July 7, 1999.

Appeal from the United States District Court for the Northern District of California. D.C. No. CV-96-03893-FMS.

Before: WOOD,[1] THOMPSON, and THOMAS, Circuit Judges.

THOMAS, Circuit Judge:

In this appeal, we must decide whether a detachment action was a legitimate exercise of local government powers, or an unconstitutional attempt to tax the United States. We conclude that the attempted detachment was an attempt to levy a tax on the United States, and therefore violated the Supremacy Clause. Accordingly, we affirm the district court.

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[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

I

Beginning in 1931, the United States acquired, through purchase, donation and condemnation, portions of land in Northern California commonly known as Hamilton Field, upon which it built the Hamilton Air Force Base military facility ("the base"). *See State of California ex rel State Lands Comm'n v. United States*, 512 F.Supp. 36, 37-38 (N.D.Cal.1981). From the time it was built until it was decommissioned in 1974, the base provided its own first response fire protection.

With the termination of active Air Force operations, management of the structural facilities at Hamilton Field, including government housing, post exchange, commissary and gas stations, was transferred to the United States Navy. Hamilton Field's runways and air-support facilities were operated at various times by the United States Air Force and Army Reserves. Beginning in 1996, the United States Coast Guard, which had previously occupied some portions of the base for use by its Pacific Strike Team, also commenced management of some facilities at Hamilton Field.

Following the decommissioning of the base in 1974, the Air Force maintained only minimal fire protection at Hamilton Field, essentially limiting coverage to aeronautically-related fires. Because the base was left without structural fire protection, the Navy contracted with the Novato Fire Protection District ("District") for fire protection and emergency medical services for those portions of Hamilton Field managed by the Navy and the Coast Guard. The contract provided for the payment of a flat fee in the amount equivalent to the revenue that the District would have received if the Navy properties were assessed local property taxes. The contract has been annually renewed by the parties.

Concerned that the contractual arrangements might constitute an impermissible inter-governmental tax, the

District commenced proceedings to detach Hamilton Field from the District, with the hope of providing fire protection services to Hamilton Field on an out-of-district contractual basis.[2] Thus, in November 1976, the District's Board of Commissioners ("District Board") adopted a resolution applying for detachment of Hamilton Field from the legal boundaries of the District. The stated purpose of the proposed detachment was to ensure that the District would continue to "receive compensation for any services it provided to the currently tax exempt properties."

In February 1977, the Local Agency Formation Commission of Marin County ("LAFCo")[3] passed a

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[2] At the time of this detachment action, the requisite procedures for such actions were codified at California Government Code sections 56000 through 56550 (West 1966). Detachment was defined at section 56038 as "the detachment, deannexation, exclusion, deletion or removal from a district of any portion of the territory of such district." Cal. Gov't Code § 56038 (West 1966).

[3] LAFCo is an acronym generally used to refer to a California local agency formation commission. At the time of the detachment action the statutory powers of these agencies were codified in California Government Code sections 54773 through 54799.5 (West 1966). The purpose of these LAFCos was "the orderly development of local agencies," to which end they were vested with the power to "develop and determine the sphere of influence" of each California county. Cal. Gov't Code § 54774 (West 1966 & Supp.1976); *see also Simi Valley Recreation and Park Dist. v. Local Agency Formation Commission of Ventura County*, 51 Cal.App.3d 648, 124 Cal.Rptr. 635, 648-49 (1975) (interpreting, *inter alia*, section 54774 in delineating the authority of a LAFCo in a challenged detachment action). Thus, in California counties, local agency formation commissions were vested with the power to organize districts such as the fire protection district at issue in this case. Cal. Gov't Code § 54774 (West 1966 & Supp.1976).

The provisions controlling the formation and powers of LAFCos have been subject to substantial revision since the time of the detachment action, and are now codified at California Government Code sections 56325 through 56337 (West 1997 & Supp.1999).

resolution approving the detachment proceedings and calling for an election to confirm or reject the decision of the District Board to detach Hamilton Field. On August 1, 1977, the District Board adopted a resolution formally initiating detachment proceedings, and setting August 17, 1977, as the date for a hearing on the proposed detachment. On August 15, 1977, the Navy notified the District Board that it objected to the proposed detachment. The Air Force lodged similar written protests in letters dated August 8, and August 16, 1977. On August 17, 1977, the District Board conducted the public hearing, and passed and adopted a resolution in favor of the detachment action.

On August 26, 1977, LAFCo's Executive Officer provided a written analysis of the proposed detachment. This analysis reiterated the stated purpose of the detachment action, and indicated that the Air Force, Navy, and Government Service Administration opposed the action.

A single—tally election—one combining the votes taken both within and outside the area to be detached—was held on November 8, 1977. After the election, in which the detachment action was approved by a vote of 3949 "yes" votes to 943 "no" votes, the District Board adopted a resolution ordering Hamilton Field detached from the District on the basis of a majority vote. Subsequently, the detachment was recognized by LAFCo and by the California Secretary of State.

On October 8, 1996, after the District and the Navy were unable to agree on the terms of the contract for the District's provision of fire protection and emergency medical services to Hamilton Field, the District initiated this action by filing a complaint in the Superior Court of California for the County of Marin, seeking a judicial declaration as to the validity of the detachment action. Such a declaration would have effectively required the United States to continue to contract with the District for fire and emergency medical services.

The United States removed the case to the United States District Court for the Northern District of California, where it sought a judicial declaration that the District was required by state law to provide fire protection services to Hamilton Field. After the issue had been joined, the District and the United States filed cross-motions for summary judgment. The district court granted the United States' motion on the ground that the detachment action was invalid under California state law. The district court therefore also denied the District's summary judgment motion. Judgment was entered on January 29, 1998, and the District timely appealed.

II

With its decision in *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 4 L.Ed. 579 (1819), the Supreme Court first articulated the principle that the Supremacy Clause, United States Constitution, Article VI, clause 2, precludes a state from levying a tax on the operations of the United States. In *United States v. Allegheny County*, 322 U.S. 174, 176, 64 S.Ct. 908, 88 L.Ed. 1209 (1944), the Supreme Court reaffirmed and expanded upon the principle that "possessions, institutions, and activities of the Federal Government itself in the absence of congressional consent are not subject to any form of state taxation." Although the broad scope of governmental tax immunity has been tailored to cover only taxes on instrumentalities "so closely connected with the government that the two cannot realistically be viewed as separate entities," *United States v. New Mexico*, 455 U.S. 720, 735, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), the parties do not dispute that the federal occupants of Hamilton Field enjoy inter-governmental tax immunity.

Although Hamilton Field was always situated completely within the contours of the District's boundaries, the District never attempted to directly assess taxes from the United States. However, when the District assessed a fee equivalent

to a theoretical property tax as a condition for providing fire and emergency medical services, its actions clearly ran afoul of the Supremacy Clause.

When analyzing whether a fee constitutes an impermissible tax, "we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted." *Carpenter v. Shaw*, 280 U.S. 363, 367-68, 50 S.Ct. 121, 74 L.Ed. 478 (1930). When the a fee is imposed on the United States for the purpose of extracting by fee that which cannot be extracted by taxation, the imposition of that fee may violate the Supremacy Clause. *See United States v. City of Huntington*, 999 F.2d 71, 73 (4th Cir.1993).

This is not to say that the United States cannot be charged reasonable fees related to the cost of governmental services provided, such as payment for metered water usage. *See id.* However, the contractual fees that the District charged the government in exchange for continued fire and emergency medical protection were based not upon the actual cost of services provided to Hamilton Field, but rather upon the value of the property in question. The fee was calculated to be "an amount equivalent to the revenue the District would receive were the Navy on property tax roles." The assessed tax value of a property is not equivalent to the cost of services rendered to that property. Indeed, tax revenue may be allocated to unrelated government services. *See San Miguel Consolidated Fire Protection Dist. v. Davis*, 25 Cal.App.4th 134, 30 Cal.Rptr.2d 343 (1994) (upholding as constitutional a statute reallocating property tax revenue from fire protection districts to county educational revenue augmentation funds.)

Although this Circuit has never reached the question, the Fourth Circuit and the Court of Claims have found that the imposition of a flat fee such as the one employed by the

District is unconstitutional. *See Folio v. City of Clarksburg*, 134 F.3d 1211, 1217 (4th Cir.1998); *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 275-76 (Fed.Cl.1997), *aff'd by* 153 F.3d 1375 (Fed.Cir.1998). Furthermore, in *Huntington*, the Fourth Circuit concluded that fire protection was a core government service, and that, consequently, the attempts by a municipality to charge for this and other such services were invalid. 999 F.2d at 74. Otherwise "virtually all of what are now considered taxes could be transmitted into user fees by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a police fee." *Id.* Accordingly, we hold that the fees charged to the United States by the District for fire protection and emergency medical services clearly constituted an impermissible tax.

III

Because we must look at the effect, not the form, of the local government action, *Allegheny County*, 322 U.S. at 184, 64 S.Ct. 908, we also conclude that the District's detachment violated the Supremacy Clause. The intent of the detachment action was to circumvent inter-governmental tax immunity by removing the District's pre-existing duty to provide core government services. We cannot allow a municipality to initiate a detachment action with the purpose of charging the federal government a flat fee for basic services that the municipality otherwise has a duty to provide. To do so would effectively give that municipality a method of assessing a property tax from the federal government in exchange for the provision of any and all basic services. This is not constitutionally permissible under the Supremacy Clause.

Decisive in this analysis is the fact that the District did, in fact, have a duty to provide the core services to the United States prior to the attempted detachment eaction. Fire protection districts were and are part of a comprehensive state program of fire protection, charged with the duty and

responsibility of providing fire protection within the defined district boundaries.[4] At the time of the attempted detachment, a fire protection district was required to provide primary fire protection services to all entities in the district, even structures designated as in the State's area of responsibility. *See* Cal. Health & Safety Code § 13821 (West 1966 & Supp.1976).

When the District was formed, Hamilton Field was included within the district boundaries. Thus, the District had the obligation to provide fire protection and emergency medical services. The fact that the Air Force chose to

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[4] At the time of the action, California Health and Safety Code section 13821 provided: "The district *shall* have fire protection responsibility for the structures in the area." (Emphasis added.) When the statute was amended in 1987, the California legislature re-affirmed the duties of the fire protection district. *See* Cal. Health & Safety Code § 13811 (West 1994 & Supp.1999). The legislature also made findings as to the historic and continuing role of the fire protection district in California, providing:

> The Legislature finds and declares that the local provision of fire protection services, rescue services, emergency medical services, hazardous material emergency response services, ambulance services, and other services relating to the protection of lives and property is critical to the public peace, health, and safety of the state. Among the ways that local communities have provided for those services has been the creation of fire protection districts. Local control over the types, levels, and availability of these services is a long-standing tradition in California which the Legislature intends to retain. Recognizing that the state's communities have diverse needs and resources, it is the intent of the Legislature in enacting this part to provide a broad statutory authority for local officials. The Legislature encourages local communities and their officials to adapt the powers and procedures in this part to meet their own circumstances and responsibilities.

Id. at § 13801.

maintain its own first response system for many years does not alter the District's legal duties.[5] In fact, during the period the Air Force provided a first response service, the District provided secondary response services. The District, of course, recognized its duty to provide services, and commenced the detachment procedure to relieve itself of this duty. Indeed, the District has been refreshingly candid in its aims. LAFCo's Executive Director noted in his analysis of detachment that the "federally owned lands are exempt from taxation" and that the District wished a contract that "generally provides for payment of an amount equivalent to the revenue the District would receive were the . . . properties on the tax rolls."

Given this acknowledgment of a pre-existing duty to provide an essential government service, the District cannot now contrive to tax the United States through gerrymandering. There is a balance to be struck in ascertaining when local government action is, in fact, a disguised attempt to tax the United States. Courts must be careful not to intrude on the legitimate actions of local governments. However, under the unique circumstances of this case, it is clear that the local government action was

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[5] Although not binding, we note that the decisions of the Comptroller General also invoke this reasoning. In a ruling issued to the Administrator of the General Service Administration, 53 Comp. Gen. 410, 1973 WL 8803 (1973), the Comptroller General held that: "Where there existed a statutory duty of a municipality, fire district or county to render firefighting services to a property within its limits without cost to the owners of the property, such duty extended to protecting the property of the United States." *Id.* at * 2. Because the fire protection district in that case had a statutory duty to provide the services in question, the Comptroller General concluded that there was no legal basis upon which to authorize payments for such service. *Id.*

purely designed to circumvent *M'Culloch* and its progeny. As such, the detachment violated the Supremacy Clause.

IV

We also reject the District's contention that the doctrines of estoppel and waiver bar the United States' challenge to the detachment action. These doctrines are equitable remedies. *See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1362 (9th Cir.1998). We therefore review the trial court's refusal to grant these remedies for an abuse of discretion. *See Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th Cir.1997).

A party claiming estoppel against the government must demonstrate both that it detrimentally relied on the Government's conduct, and that it did so reasonably. *See Heckler v. Community Health Serv. of Crawford*, 467 U.S. 51, 59, 104 S.Ct. 2218, 81 L.Ed.2d 42 (1984). In this case, the district court determined that the District was required to show that "it is worse off than it would have been had the government insisted upon free fire protection from the start, and this it has not done." Citing *Heckler*, 467 U.S. at 62-62, 104 S.Ct. 2218, the district court indicated that the District's "inability to retain money it should never have received" is not a sufficient detriment. The court thereby determined that the government was not estopped from challenging the validity of the detachment and the future payments that the action would require. We agree. The district court did not abuse its discretion in refusing to apply the doctrine of estoppel in this case, and we affirm its conclusion.

The District also argues that the doctrine of waiver bars the United States' claim, because the Navy and Army made twenty years of uninterrupted contract payments, which stand as "conclusive evidence of intentional relinquishment of known rights" by the United States. However, the district court concluded that, because the detachment was invalid, and the District was therefore at all times obligated to

provide free fire and emergency medical services to the area, the agents of the government who entered into these contracts were unauthorized to pay for the free service. *See In re 9-1-1 Emergency Number Fee, Hillsborough County, Florida*, 66 Comp. Gen. 385, 1973 WL 8803, at * 2 (1987) ("absent a tangible benefit and measurable value to the United States, there is no authority to pay any service charge"). The district court therefore concluded that the government had not waived its rights because it could not be bound by the illegal actions of its officers. *See United States v. Fowler*, 913 F.2d 1382, 1385-86 (9th Cir.1990). We agree, and find that the district court did not abuse its discretion in refusing to apply the doctrine of waiver.

V

Because the detachment action was barred by the Supremacy Clause, we need not determine whether the action was procedurally deficient under California state law.[6] Nor

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[6] In this case, the district court also denied the District's motion for reconsideration, in which the District argued that the government's action was barred by California Government Code section 850 (West 1995) (providing public entities and employees with absolute immunity from injury resulting from a failure to provide fire protection). The denial was issued upon the grounds that the claim was not raised in its motion for summary judgment. A district court has discretion to decline to consider an issue raised for the first time in a motion for reconsideration. *Columbia Pictures Television v. Krypton Broad*, 106 F.3d 284, 290 (9th Cir.1997), rev'd on other grounds, 523 U.S. 340, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998). The district court relied upon the Seventh Circuit's decision in *Publisher's Resource, Inc. v. Walker Davis* in support of its decision not to reopen the case on the ground that the argument that was not raised in the District's initial motion for summary judgment. 762 F.2d 557, 561 (7th Cir.1985). We find that the district court did not abuse its discretion in refusing to reconsider the matter in light of this new argument. We also conclude that the District's failure to raise the issues in the summary judgment motions waives their right to do so on appeal. *Id.*

is the constitutional challenge[7] to the detachment action barred by California's six month limitation period, as the United States is not bound by state statutes of limitations period when asserting a federally created right. *See United States v. Summerlin*, 310 U.S. 414, 417-18, 60 S.Ct. 1019, 84 L.Ed. 1283 (1940); *United States v. Dos Cabezas Corp.*, 995 F.2d 1486, 1489 (9th Cir.1993); *United States v. California*, 932 F.2d 1346, 1351 (9th Cir.1991), *aff'd on other grounds*, 507 U.S. 746, 113 S.Ct. 1784, 123 L.Ed.2d 528 (1993).

VI

Because the detachment action in this case constituted a violation of the Sovereign Immunity Clause, the holding and order of the district court are AFFIRMED.

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[7] We need not, and do not, decide whether the United States' state statutory challenges are barred by California's statute of limitations. *See* Cal.Civ.Proc.Code § 349.1 (West 1982) (imposing six month statute of limitations for legal challenges to the validity of a district reorganization action).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NOVATO FIRE PROTECTION DISTRICT,	) No. C 96-3893 FMS
Plaintiff,	) ORDER DENYING) PLAINTIFF'S MOTION
vs.	) FOR SUMMARY) JUDGMENT; GRANTING
UNITED STATES OF AMERICA,	) DEFENDANT'S CROSS-) MOTION FOR SUMMARY
Defendant.	) JUDGMENT

INTRODUCTION

The parties' cross-motions for summary judgment require the Court to determine whether the California statute of limitations for challenging a detachment proceeding binds the United States in this case, whether equitable doctrines bar the suit, whether the detachment of Hamilton Field was an unconstitutional attempt to tax the United States, and whether the detachment violated California law.

BACKGROUND

Plaintiff Novato Fire Protection District provides fire protection and emergency medical services to all properties within its geographic boundaries in Marin County. Until 1978, NFPD's service area included Hamilton Field, a piece of federal property that was originally used as a military installation and is now occupied by the Coast Guard.

In 1976, NFPD applied to detach Hamilton Field from its geographic boundaries. In February of 1977, the Marin Local Agency Formation Commission approved the detachment application, provided that the detachment be confirmed by an election held in Hamilton Field and the

remainder of NFPD's service area. After conducting a public hearing on the issue, NFPD passed a resolution to detach Hamilton Field. On November 8, 1977, Marin County voters approved Hamilton Field's detachment by a vote of 3949 to 943. In January of 1978, the California Secretary of State issued a Certificate of Filing, confirming the detachment.

Since January of 1978, the United States has entered into annual contracts with NFPD to purchase fire protection services for Hamilton Field. In 1996, however, the United States asserted that the 1978 detachment was invalid, and that NFPD was obligated to provide fire protection and emergency medical services to Hamilton field free of charge.

NFPD sued the United States for declaratory relief that the detachment was valid; the action was removed to federal court on October 25, 1996.[1] On May 23, 1997 the Court permitted the United States to file a third-party complaint against the City of Novato (the "City") asserting that if NFPD was not obligated to provide fire protection, the City was. On November 12, 1997, the Court granted the City's motion for leave to amend its answer by adding a claim against NFPD.

NFPD now moves for summary judgment and requests declaratory relief that the detachment of Hamilton Field was valid, final, and conclusive, and that it has no obligation to provide services to the Field. The United States cross-moves for summary judgment and requests declaratory relief that the Hamilton Field detachment is not valid and that NFPD must provide fire protection and emergency medical services to Hamilton Field without contractual agreements.

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[1] The parties agreed that NFPD would provide fire protection for Hamilton Field in return for compensation to paid to an escrow account pending the resolution of the controversy.

DISCUSSION

I. Legal Standard

To withstand a motion for summary judgment, the opposing party must set forth specific facts showing that there is a genuine issue of material fact in dispute. *See* Fed. R. Civ. P. 56(e). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, "the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In opposing summary judgment, plaintiff is not entitled to rely on the allegations of his complaint. He "must produce at least some 'significant probative evidence tending to support the complaint.'" *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (quoting *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290 (1968)).

The Court does not make credibility determinations with respect to evidence offered, and is required to draw all inferences in light most favorable to the non-moving party. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630-31 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Summary judgment is therefore not appropriate "where contradictory inferences may reasonably be drawn from undisputed evidentiary facts . . . ." *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir. 1980).

II. Analysis

The United States argues that the detachment is invalid for two reasons: because it is an unconstitutional attempt to

indirectly levy a tax on the Government, and because it was approved in a manner that violated California law. NFPD responds that the United States is barred from challenging the validity of the detachment by a statute of limitation contained in the California Code of Civil Procedure, and by the doctrines of estoppel, waiver, and laches. The Court must consider these threshold issues raised by NFPD before turning to the Government's arguments on the merits.

A. Threshold Issues

1. California Statue of Limitations

Under principles of sovereign immunity, the United States is not generally subject to state statutes of limitations. *See United States v. State of California*, 932 F.2d 1346, 1350-51 (9th Cir. 1991), *aff'd on other grounds*, 507 U.S. 746 (1993). It must, however, follow state claim procedures that are "a condition precedent to, or an integral element of" a state cause of action. If the claim procedure is not followed, the government never even acquires a cause of action. *Id.* That exception does not apply to this case because the six-month limitation in the California statute relied upon by plaintiff is not a claim procedure prerequisite to a cause of action, but simply a standard statute of limitations. *See* Cal. Code Civ. Proc. § 349.1 (legal acts relating to changes in territorial boundaries of special districts "shall not be contested in any action unless such action shall have been brought within six months of the date of completion of said acts or proceedings"). The Court therefore holds that the Government is not bound by the state statute of limitations in this case.[2]

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[2] NFPD urges the Court to rely on *United States v. City of Leavenworth*, 443 F. Supp. 274 (D. Kan. 1977), a case in which the government, having failed to challenge an annexation within the thirty-day period required by Kansas law, was held to be bound (...continued)

2. Laches, Waiver, and Estoppel

"The government is not subject to the defense of laches when enforcing its rights." *United States v. Menatos*, 925 F.2d 333, 335 (9th Cir. 1991). Although the Government can be subject to the defense of waiver, it cannot waive its rights through the unlawful actions of its agents or officers. *See United States v. Fowler*, 913 F.2d 1382, 1386-87 (9th Cir. 1990). As discussed below, the detachment in this case was invalid under California law, so the Government was entitled to receive the fire protection services without having to contract for them. The Comptroller General has held that where a local agency is requited to provide a service for free, agencies of the government are not authorized to pay for them. *See Matter of: 9-1-1 Emergency Number Fee, Hillsborough County, Florida*, 66 Comp. Gen. 385 (1987). Inequitable though it may seem, the Government's entering into contracts for the past twenty years thus does not waive its right to challenge the detachment.

NFPD also argues that the government is estopped from asserting the invalidity of the Hamilton Field detachment. A party claiming estoppel against the Government must have detrimentally relied on the Government's conduct, and must have done so reasonably. *See Heckler v. Community Health Serv. of Crawford*, 467 U.S. 51, 59 (1984). Estoppel is inappropriate in this case because NFPD has not shown any detriment it has suffered by entering into the contracts with the Government for the last twenty years. It is not enough for NFPD to assert that it will be harmed if it is now required to provide the services for free, or that it may eventually be forced to return the contract payments it has received. The

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by that statute of limitation. The Court believes the result in *City of Leavenworth* to be inconsistent with Ninth Circuit law, and so cannot rely upon it.

"inability to retain money it should never have received" is not a sufficient detriment on which to base an estoppel. *See Heckler*, 467 U.S. at 62-63. NFPD must show that it is worse off than it would have been had the Government insisted on free fire protection from the start, and this it has not done. The Court therefore holds that the Government is not estopped from challenging the validity of the detachment.

B. The Lawfulness of the Detachment

1. Supremacy Clause

The United States argues that the detachment is an unconstitutional tax on the Government because it was meant to force the Government to pay for fire protection services which it was entitled to receive for free. The Supremacy Clause prohibits states from taxing the operations of the federal government. *See United States v. Allegheny County*, 322 U.S. 174, 176 (1944). In support of its contention that the detachment was an indirect tax, the government cites to the "impartial analysis" printed on the ballot, and to several contemporaneous documents, which state that the purpose of the detachment was to obtain compensation for fire protection services to areas for which no taxes were collected. See Declaration of Gregory A. Wedner in Support of Plaintiff NFPD's Motion for Summary Judgment at 15, 26-27, 35-36. The Court, however, agrees with NFPD that the detachment cannot be considered an attempt to impose a tax. Discontinuing fire protection services to Hamilton Field did not force the government to enter into the contracts with NFPD. Faced with the detachment, the government could have chosen, for example, to expand its own fire protection capabilities. Because the detachment does not have the compulsory character of a tax, the Court holds that it did not violate the Supremacy Clause.

2. California Law

The Government claims that the detachment was invalid for two independent reasons: because it violated a requirement that detachments be abandoned upon a majority protest, and because it violated a requirement that elections held in the area to be detached and the remainder of the District be separately tallied. The Court agrees with the Government on both issues:

a. Majority Protest Requirement

The Government asserts that the detachment was required to be withdrawn in the face of the Government's written protest of August 1977. In discussing this issue, the parties appear to be relying on different versions of former section 56316 of the Government Code, which governed majority protests. In 1970, California law was amended so that it provided in pertinent part:

> A majority protest shall be deemed to exist and the proposed annexation or detachment shall be abandoned if the board of directors shall find and declare by resolution that written protests filed and not withdrawn prior to the conclusion of the hearing represent: (a) in the case of the annexation or detachment of inhabited territory,
>
> (1) more than 50 percent of the assessed value of the land therein, or
>
> (2) more than 50 percent of the voting power of voters entitled to vote as a result of residing in or owning land within such territory.

1970 Cal. Stat. Ch. 953 § 1. In 1977, the legislature again amended this provision, essentially removing subprovision (a)(2), with the result that the new statute permitted a majority protest for inhabited land to be filed only by voters, not landowner-voters. *See* 1977 Cal. Stat. Ch. 90 § 6. That amendment was approved by the Governor and filed with the

Secretary of State on June 2, 1977, after the detachment proceedings had begun but before the Government filed its written protest in August, 1977. Under Article 4, section 8 of the California Constitution, however, the 1977 amendment did not take effect until January 1, 1978. At the time the Government filed its protest, therefore, the governing law was the 1970 version of section 56316.

Given that the Government owned all of Hamilton Field, its protest represented more than half the assessed value of the area to be detached, satisfying the requirement of section 56316. Because the proposed detachment could therefore not legally continue, the Court holds that the detachment was invalid.

b. Separate Tally Requirement

The Government also argues that the election confirming the detachment violated California law because the votes of the residents of Hamilton Field were not tallied separately from those of the residents of the rest of the district. The relevant section, former California Government code section 56252, provided for elections held "(a) Only within the territory ordered to be annexed or detached; or (b) Both within the territory ordered to be annexed or detached and within all or such part of said district as is outside of such territory." 1965 Cal. Stat. Ch. 2043 § 2. Section (b) is ambiguous: it could be read to refer either to a single election held both inside and outside the detached area, as actually occurred, or to separate elections inside and outside, as the Government asserts should have occurred.

Former California Government code section 56324 suggests that the Government's reading is correct. As revised in 1970, that section read in pertinent part that:

> The board of directors shall adopt a resolution confirming the order of annexation or detachment, if

> a majority of the votes cast upon such question are in favor of such annexation or detachment:
>
> (a) At an election called only within the territory ordered to be annexed or detached; or
>
> (b) At each election where one election was called within the territory ordered to be annexed or detached and another election within all or such part of said district as is outside said territory.

1970 Cal. Stat. Ch. 953 § 2. This reference to two separately tallied elections strongly suggests that section 56252(b) also referred to two elections.

The case of *Simi Valley Recreation and Park Dist. v. Local Agency Formation Comm'n of Venture County*, 124 Cal. Rptr. 635 (Cal. Ct. App. 1975), does not suggest otherwise. In that case, the commission chose, pursuant to 56252(a), to hold an election only within the territory to be detached, which had only five residents, and not within the rest of the district, which included the relatively populous town of Simi Valley. *See id.* at 641, 657. After the five voters approved the detachment, the plaintiffs challenged the commission's decision on the ground that it unconstitutionally deprived Simi Valley residents of their right to vote on the detachment. *See id.* at 653. In the course of rejecting that argument, the court considered what would have occurred had the election instead been conducted under 56252(b). The court stated that in view of the population disparity between the detached area and the rest of the district, "an election which included the residents of the remainder of the district would have been one in which the selfish interest of such residents would wholly determine the result." *Id.* at 657. This passage does not aid the Court in construing section 56252(b), for in *Simi Valley* the remainder of the district would have controlled the outcome of the election under either construction: If the elections had been tallied separately they would have vetoed the detachment in

their separate election, and if the elections had been tallied together they would have achieved the same result simply by overwhelming the five votes from the area proposed to be detached.

The Court therefore holds that former section 56252(b) required separately tallied elections in the area to be detached and the remainder of the district. Because such a vote did not occur in this case, the detachment was confirmed by a process that violated California municipal reorganization law, and is invalid.

CONCLUSION

For the foregoing reasons, the Court DENIES plaintiff's motion for summary judgment, and GRANTS defendant's cross-motion for summary judgment. Judgment shall be entered in accordance with this order. Further, the United States is ORDERED to show cause why its claim against the City of Novato should not be dismissed as moot, and the City of Novato is ORDERED to show cause why its claim against the NFPD and the United States should not be dismissed as moot. The United States and the City of Novato shall file their responses no later than *ten days* from the date of this order.

SO ORDERED.

Dated: January 7, 1998

s/Fern M. Smith

FERN M. SMITH
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

FILED
SEP 22 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOVATO FIRE PROTECTION DISTRICT("NFPD"), Plaintiff-Appellant, v. UNITED STATES OF AMERICA; U.S. COAST GUARD, Defendants-Appellees	No. 98-15441 D.C. No. CV-96-03893-FMS ORDER

Before: WOOD[1], THOMPSON, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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[1] The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

Supreme Court, U.S.
FILED
APR 19
CLERK

(2)

No. 99-1209

In the Supreme Court of the United States

NOVATO FIRE PROTECTION DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a local fire protection district, which has an obligation under state law to provide services to all entities within its borders, may, to avoid providing services to a tax-exempt federal property, redraw its borders to exclude the federal property and impose on the federal government a fee for fire protection services in "an amount equivalent to the revenue the District would receive were the [federal property] on [the] tax rolls." Pet. App. 6a.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 181 F.3d 1135. The opinion of the district court (Pet. App. 13a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 1999. A petition for rehearing was denied on September 21, 1999. Pet. App. 23a. On December 6, 1999, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 20, 2000. The petition for a writ of certiorari was filed on January 19, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under California law, fire protection services are generally provided by Fire Protection Districts. Pet. App. 7a-8a & n.4. The Novato Fire Protection District (NFPD or District) has an obligation under California law to provide fire protection and emergency medical services to all entities located in the District, which is in Marin County, California. *Id.* at 8a, 13a.

In the 1930s, the United States acquired Hamilton Field and built the Hamilton Air Force Base on the property, which is located in Marin County. Pet. App. 2a, 13a. Until the base was decommissioned in 1974, the federal government provided its own primary fire protection services on the base, and NFPD provided secondary response services. *Id.* at 2a, 9a. After the base was decommissioned, the Navy (which became the principal occupant of the property) sought to obtain NFPD's primary fire protection services. *Id.* at 2a.

NFPD entered into a contract with the Navy to provide primary fire protection services on the base. The contract required the federal government to pay a fee for fire protection services. Pet. App. 2a. NFPD was aware both that the base was within the district's geographical boundaries and that, as federal property, the base was exempt from state taxation. *Id.* at 9a; Court of Appeals Excerpts of Record (C.A. E.R.) 132. The fee specified in the contract, however, was not calculated based on the cost of providing fire protection services to Hamilton Field. Instead, the contract required the Navy to pay NFPD "an amount equivalent to the revenue the District would receive were the Navy on property tax rolls." Pet. App. 6a.

Concerned that this charge might constitute an impermissible tax on the federal government because of

NFPD's pre-existing state-law duty to provide fire protection services within the District, NFPD sought to eliminate the problem by redrawing the District's boundaries to exclude Hamilton Field. Pet. App. 2a-3a. NFPD therefore petitioned the Local Agency Formation Commission for Marin County (LAFCo) for permission to initiate proceedings to detach the federal property from the District. *Id.* at 3a.[1]

As LAFCo's Executive Director explained, NFPD's purpose in seeking detachment was "to insure that it will receive compensation for any services it provides to the currently tax exempt properties." C.A. E.R. 132 In addition, a resolution of NFPD's Board of Directors explained that "the reason for said proposed detachment is that the District may have the legal responsibility for providing fire protection to said territory, and said territory produces no tax revenue to District to pay for such services, which imposes an intollerable [*sic*] burden upon the remaining property owners in the District." C.A. E.R. 137-138.

In response to NFPD's petition, LAFCo passed a resolution approving the detachment proceedings and calling for an election to confirm NFPD's decision to exclude Hamilton Field from the District. Pet. App. 3a-4a. Despite formal objections from the Navy and the Air Force, NFPD's Board adopted a resolution in favor of detachment. *Id.* at 4a.

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[1] At the time, local agency formation commissions had the power to organize fire protection districts. See Cal. Gov't Code § 54774 (West 1966 & Supp. 1976); Pet. App. 3a nn.2-3. Detachment was governed by Cal. Gov't Code §§ 56000-56550 (West 1966) and defined as "the detachment, deannexation, exclusion, deletion or removal from a district of any portion of the territory of such district." Cal. Gov't Code § 56038 (West 1966).

The detachment issue was included on the ballot in the November 1977 local election. The votes of the residents of the federal property were not separately tallied. Marin County voters approved detachment of the federal property, and the California Secretary of State recognized the detachment. Pet. App. 4a.

From the time of the detachment until 1996, the federal government entered into annual contracts with NFPD to obtain fire protection services for Hamilton Field. Pet. App. 2a, 14a. By the terms of those contracts, the annual payment was, as it was in the original contract, in "an amount equivalent to the revenue the District would receive were the [federal property] on [the] tax rolls." *Id.* at 6a.

2. In 1996, NFPD and the United States were unable to agree on the terms of the contract for fire protection services. In response, NFPD filed suit in the Superior Court of California for the County of Marin to obtain a declaration that the detachment was valid and that, as a result, NFPD had no obligation to provide fire services to Hamilton Field. Pet. App. 4a. The United States removed the case to the United States District Court for the Northern District of California, and the parties filed cross-motions for summary judgment. *Id.* at 5a.

The district court granted the United States' motion. Pet. App. 22a. The court first held that the United States was not subject to a state-law statute of limitations in its challenge to the detachment proceedings and that the government's claim was not barred by the doctrines of waiver or estoppel. *Id.* at 16a-18a.

The court then held that the detachment was invalid because it violated two state-law requirements. Pet. App. 19a-22a. First, the court concluded that the detachment violated the version of Cal. Gov't Code

Section 56316 that was in effect in August 1977. That provision required that a detachment proceeding be abandoned if "written protests filed and not withdrawn prior to the conclusion of the hearing represent * * * [m]ore than 50 percent of the assessed value of the land therein." Cal. Gov't Code § 56316(a)(1) (West 1966 & Supp. 1976). Because the government "owned all of Hamilton Field," the court concluded that "its protest represented more than half the assessed value of the area to be detached, satisfying the requirement of section 56316." Pet. App. 20a. The court therefore ruled that "the detachment was invalid." *Ibid.*

Second, the court concluded that the detachment violated the former Cal. Gov't Code § 56252(b) (West 1966), which required that votes held in the area sought to be detached be tallied separately from the votes in the remainder of the district. Pet. App. 20a-22a. Because "such a vote did not occur in this case, the detachment was confirmed by a process that violated California municipal reorganization law, and is invalid." *Id.* at 22a.

3. The court of appeals affirmed on federal-law grounds. Pet. App. 12a. The court held that the detachment and contractual fees that NFPD charged the United States violated the federal government's constitutional immunity from state taxation. *Id.* at 5a-10a. The court explained that inter-governmental tax immunity, first recognized in *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819), applies only to taxes imposed on entities "so closely connected with the government that the two cannot realistically be viewed as separate entities." Pet. App. 5a (quoting *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982)). The court noted that the "parties do not dispute that the federal

occupants of Hamilton Field enjoy inter-governmental tax immunity." *Ibid.*

The court held that the contractual fees that NFPD charged the federal government constituted an unconstitutional tax. Pet. App. 5a-7a. The court explained that, "[w]hen analyzing whether a fee constitutes an impermissible tax, 'we are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.'" *Id.* at 6a (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930)). Because the "fees that the District charged the government in exchange for continued fire and emergency medical protection were based not upon the actual cost of services provided to Hamilton Field, but rather upon the value of the property in question," the court concluded that the fees amounted to an impermissible tax. *Ibid.*

The court reached that conclusion in light of its holding that the detachment of the property violated the Supremacy Clause. Pet. App. 7a-10a. The court noted that NFPD and LAFCo acknowledged the District's "pre-existing duty to provide" fire protection services to Hamilton Field. *Id.* at 9a. The court concluded that, "under the unique circumstances of this case," *ibid.*, the detachment action "effectively g[a]ve [the] municipality a method of assessing a property tax from the federal government in exchange for the provision of any and all basic services," *id.* at 7a.[2]

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[2] Because the court of appeals found the charges and detachment invalid under federal law, the court did not address the district court's holding that the detachment was invalid under California law. Pet. App. 11a.

ARGUMENT

The decision of the court of appeals is correct. Furthermore, the result reached by the court of appeals is, as the district court held, supported by independent state-law grounds. This Court's review is not warranted.

1. The court of appeals correctly concluded that NFPD's attempt effectively to assess an *ad valorem* tax on federal property is impermissible. That conclusion flows from two well-established principles of constitutional law. First, "possessions, institutions, and activities of the Federal Government itself in the absence of [express] congressional consent are not subject to any form of state taxation." Pet. App. 5a (quoting *United States* v. *County of Allegheny*, 322 U.S. 174, 177 (1944)); see also *United States* v. *New Mexico*, 455 U.S. 720, 733 (1982). Second, "the constitutional immunity doctrine * * * has, from the time of *M'Culloch* v. *Maryland*, [17 U.S. (4 Wheat.) 316 (1819),] barred taxes that 'operat[e] so as to discriminate against the Government or those with whom it deals.'" *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 812 (1989) (quoting *United States* v. *City of Detroit*, 355 U.S. 466, 473 (1958)).

As the court of appeals explained, NFPD recognized but sought to evade those basic rules of constitutional law. Pet. App. 2a-3a, 9a; see C.A. E.R. 132. NFPD acknowledged its duty to provide fire protection services to all entities within the District, including Hamilton Field. Pet. App. 9a. Further, NFPD did not dispute that, before the 1977 detachment proceedings, Hamilton Field was within the District. *Id.* at 8a. NFPD was concerned that, because the "Hamilton properties remain publically [*sic*] owned and therein

tax exempt, they will not produce any tax revenues to the District." C.A. E.R. 132. Aware that it could not levy a direct tax on the federal properties or refuse selectively to provide fire services to those properties, NFPD sought to accomplish indirectly what it could not accomplish directly: NFPD attempted to redraw its boundaries to exclude Hamilton Field, and then sought to levy on the federal government a charge in an "amount equivalent to the revenue the District would receive were the Navy on property tax rolls," Pet. App. 6a, in the hope that it could "ensure that the District would continue to receive compensation for any services it provided to the currently tax exempt properties," *id.* at 3a (internal quotation marks omitted). See also C.A. E.R. 137-138 ("[T]he reason for said proposed detachment is that the District may have the legal responsibility for providing fire protection to said territory, and said territory produces no tax revenue to District to pay for such services, which imposes an intollerable [*sic*] burden upon the remaining property owners in the District.").

In those "unique circumstances," Pet. App. 9a, the court of appeals correctly concluded that the detachment and contractual charge, when viewed together, constitute an impermissible attempt to tax the federal government. See *id.* at 5a-10a. As the court of appeals explained, "[w]hen analyzing whether a fee constitutes an impermissible tax, '[federal courts] are not bound by the characterization given to a state tax by state courts or legislatures, or relieved by it from the duty of considering the real nature of the tax and its effect upon the federal right asserted.'" *Id.* at 6a (quoting *Carpenter* v. *Shaw*, 280 U.S. 363, 367-368 (1930)). Looking to "the effect, not the form, of the local government action," *id.* at 7a (citing *County of Allegheny*, 322 U.S.

at 184), the court of appeals inquired whether the detachment, in conjunction with NFPD's decision to assess a contractual fee in an "amount equivalent to the revenue the District would receive were the Navy on property tax rolls," *id.* at 6a, was in effect an attempt to tax the federal government.

As the court of appeals explained, the contractual fee that NFPD sought to charge the federal occupants of Hamilton Field was not based on "the actual cost of services provided" but rather the value of the property itself. Pet. App. 6a. The charge was therefore not a permissible "user fee," which is a payment "given in return for a government-provided benefit." *United States* v. *City of Huntington*, 999 F.2d 71, 74 (4th Cir. 1993); cf. *United States* v. *City of Columbia*, 914 F.2d 151 (8th Cir. 1990) (holding that city utility fee not an impermissible tax). Instead, by assessing the fee in an "amount equivalent to the revenue the District would receive were the Navy on property tax rolls," Pet. App. 6a, NFPD levied an *ad valorem* property tax on the United States. See *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276, 287 (1976) ("[*Ad valorem*] property taxes are taxes by which a State apportions the cost of such services as police and fire protection among the beneficiaries according to their respective wealth.").

This Court has made clear that a State or locality violates the Supremacy Clause when the "substance" of its action "is to lay an ad valorem general property tax on property owned by the United States." *County of Allegheny*, 322 U.S. at 185, 192; accord *City of Huntington*, 999 F.2d at 74; *City of Cincinnati* v. *United States*, 39 Fed. Cl. 271, 274 (1997) (storm drainage charge constitutes impermissible tax because it "is based upon the size and the development intensity of the commercial property owned by the federal govern-

ment, and not on the services actually used"), aff'd, 153 F.3d 1375 (Fed. Cir. 1998). The court of appeals here thus correctly concluded that the detachment proceedings and contractual assessment constituted an impermissible attempt to tax the United States.

2. Review of the decision in this case would be particularly inappropriate because, as the district court held, the result reached by the court of appeals is also supported by independent state-law grounds. Pet. App. 19a-22a. As the district court held (*id.* at 19a), the detachment violated the state-law requirement that a detachment proceeding be abandoned if "written protests filed and not withdrawn prior to the conclusion of the hearing represent * * * [m]ore than 50 percent of the assessed value of land therein." Cal. Gov't Code § 56316 (West 1966 & Supp. 1976). Because the federal government's "protest represented more than half the assessed value of the area to be detached," the court correctly held that "the detachment was invalid." Pet. App. 20a.

The district court also concluded that the detachment violated the separate-tallying requirement of former Cal. Gov't Code § 56252(b) (West 1966). Pet. App. 20a-22a. Because separate votes "did not occur in this case, the detachment was confirmed by a process that violated California municipal reorganization law, and is invalid." *Id.* at 22a. Because the detachment was invalid, NFPD continues to have an obligation to provide fire services to Hamilton Field.

3. None of the reasons advanced by petitioner justifies this Court's review of this case.

a. Petitioner's contention (Pet. 11, 13) that the decision of the court of appeals conflicts with *Washington* v. *United States*, 460 U.S. 536 (1983), is incorrect. In *Washington*, this Court upheld a sales and use tax that

the State imposed on "contractors that work for the federal government." *Id.* at 539. The Court reaffirmed, however, the long-standing rule that a State may not lay a tax *directly* on the United States. *Id.* at 540. The charge imposed by NFPD in this case was imposed not on a third party but directly on the federal government.

b. Petitioner also errs in contending (Pet. 14-15) that Congress waived the government's immunity from liability for the NFPD charge by enacting 15 U.S.C. 2210. The court of appeals did not discuss Section 2210 in its opinion, and that statute has no bearing on the question presented by the petition.

Section 2210 provides:

> **Reimbursement for costs of firefighting on Federal property**
>
> **(a) Filing of claims**
>
> Each fire service that engages in the fighting of a fire on property which is under the jurisdiction of the United States may file a claim with the Administrator for the amount of direct expenses and direct losses incurred by such fire service as a result of fighting such fire. The claim shall include such supporting information as the Administrator may prescribe.
>
> **(b) Determination**
>
> Upon receipt of a claim filed under subsection (a) of this section, the Administrator shall determine—
>
> (1) what payments, if any, to the fire service or its parent jurisdiction, including taxes or payments in lieu of taxes, the United States

> has made for the support of fire services on the property in question;
>
> (2) the extent to which the fire service incurred additional firefighting costs, over and above its normal operating costs, in connection with the fire which is the subject of the claim; and
>
> (3) the amount, if any, of the additional costs referred to in paragraph (2) of this subsection which were not adequately covered by the payments referred to in paragraph (1) of this subsection.

15 U.S.C. 2210.

Section 2210 does not address the federal government's immunity from general, annual assessments that finance local fire protection services. Indeed, the provision does not directly address the question of intergovernmental tax immunity. As its title indicates, Section 2210 creates a mechanism to reimburse state and local governments for expenses that they actually incur in combating fires on federal property. Subsection (a) provides that state and local governments may file claims for reimbursement of direct expenses and direct losses incurred in rendering fire fighting services. Although Section 2210(b) provides that claims against the United States are to be offset by any taxes (or payments in lieu of taxes) that have been made for local fire protection services, the statute does not waive the federal government's immunity from state and local taxes. Instead, the statute merely reduces the amount of reimbursement when federal agencies or instrumentalities have, pursuant to *other* federal statutes that waive federal immunity from state and local taxation,

paid taxes that support local fire services.[3] For example, Section 2210(b) provides for a reduction in fire-control claims against Federal Reserve Banks, which must pay state and local real estate taxes under 12 U.S.C. 531. Similarly, Section 2210(b) provides for a reduction in claims against the United States when the federal government has made payments "in lieu of taxes," such as payments pursuant to federal statutes that compensate local governments for the loss of revenue occasioned by their inability to assess taxes against certain federal property located in the municipality. See 60 Comp. Gen. 637, 640 (1981). Statutes such as 31 U.S.C. 6902 (1994 & Supp. IV 1998) provide for payments by the federal government to units of local governments in which certain tax-exempt land owned by the federal government is located. Such payments, when made, may be used "for any governmental purpose." 31 U.S.C. 6902(a)(1) (Supp. IV 1998).

c. There is also no merit to petitioner's argument (Pet. 15) that the court of appeals' decision "imposes on state and local governments a constitutional obligation to provide free services to the federal government *ad*

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[3] Other federal statutes explicitly waive federal immunity from state and local taxation in specific circumstances. See, *e.g.*, 12 U.S.C. 531 ("Federal Reserve banks * * * shall be exempt from Federal, State, and local taxation, except taxes upon real estate."); 12 U.S.C. 1452(e) (The Federal Home Loan Mortgage Corporation "shall be exempt from all taxation * * * except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed."); 15 U.S.C. 713a-5 (same for taxation of real property owned by Commodity Credit Corporation). As those statutes demonstrate, when Congress intends to waive federal immunity from state and local taxation, it expresses its intention clearly.

infinitum." The decision of the court of appeals invalidated only the particular means utilized by petitioner to seek payment and did not, for example, address whether reimbursement might be available to petitioner under 15 U.S.C. 2210, for the cost of services actually rendered. Moreover, the obligation of NFPD to provide fire services to Hamilton Field arises under state, not federal, law. See Pet. App. 8a & n.4, 13a; Cal. Health & Safety Code § 13821 (West 1964); *id.* § 13811 (1994). Although California may elect generally to restrict the availability of fire protection services, one of its localities may not, because the federal government enjoys tax immunity, evade its state-law duty to provide those services to federal properties within its borders.[4]

Likewise, a locality may not, as NFPD has here, assess an *ad valorem* tax on the United States in return for the services it is required to provide under state law. Otherwise, "virtually all of what are now considered taxes could be transmuted into user fees by the simple expedient of dividing what are generally accepted as taxes into constituent parts, e.g., a police fee." Pet. App. 7a (quoting *City of Huntington*, 999 F.2d at 74). This Court's precedents do not allow such a result. See, *e.g.*, *County of Allegheny*, 322 U.S. at 185, 192.

d. Finally, petitioner's contention (Pet. 17) that the court of appeals' decision conflicts with *Printz* v. *United States*, 521 U.S. 898 (1997), lacks merit. Congress has not commanded the officers of NFPD to "enforce a federal regulatory program." *Id.* at 935. Instead, as noted above, the State of California has imposed on

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[4] Indeed, as noted above, the district court concluded that the detachment proceedings violated state law. Pet. App. 19a-22a.

NFPD the obligation to provide fire services within its District. Nothing in *Printz* suggests that NFPD may impose an *ad valorem* tax on federal property to fund that obligation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 99-1209

IN THE

Supreme Court of the United States

NOVATO FIRE PROTECTION DISTRICT,
Petitioner,

v.

UNITED STATES OF AMERICA and
UNITED STATES COAST GUARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

1. The petition demonstrated that the Ninth Circuit's decision defies a host of cases decided by this Court over the last half-century. Those cases have recognized that the doctrine of intergovernmental tax immunity has been on a "long path in decline and has now been 'thoroughly repudiated' by modern case law," *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 174 (1989), and is, therefore, now confined to the "tight limits this Court has set," *Jefferson County, Alabama v. Acker*, 119 S. Ct. 2069, 2077 (1999). Accordingly, "[s]o long as the tax is not directly laid on the Federal Government, it is valid if nondiscriminatory . . . or until Congress declares otherwise." *Washington v. United States*, 460 U.S. 536, 540 (1983).

The Novato Fire Protection District ("NFPD") showed that it had not "directly laid [a tax] on the Federal Government" because all of the revenues at issue flow to NFPD solely as a result of contracts voluntarily entered into by the United States Navy to pay NFPD for fire services. *See United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 606 (1975) (A "tax" is "an 'enforced contribution to provide for the support of the government.'") NFPD also showed that the prices charged in that contract were "nondiscriminatory" because they did not exceed tax rates used by NFPD in providing fire services to residents within the fire district. And far from "declar[ing] otherwise," Congress in 15 U.S.C. § 2210 has explicitly recognized that local governments can recover "taxes or payments in lieu of taxes" from the United States for the provision of fire services.

The Government does not depreciate the significance of the constitutional issue decided by the Ninth Circuit in this case. Instead, it defends the decision below on the ground that it was "correct." Br. in Opp. 7. The Government's only other argument is that the decision is "supported by

independent state-law grounds," *id.*, even though the Ninth Circuit's failure to so hold strongly suggests that the arguments advanced by NFPD in the court of appeals (*see* Pet. 6 n.3) persuaded the court that it could not rule for the Government on state-law grounds. *See id.* at 7, quoting *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1999), which identified the "deeply rooted" doctrine of avoiding the invalidation of governmental action as unconstitutional if other grounds for decision are available.

2. The Government's attempt to show that the Ninth Circuit was "correct" in characterizing contract payments made by the Navy to NFPD as a "tax" that is "directly laid on the Federal Government" is based on the rhetoric of its brief, not the reality of the undisputed facts in this case. The Government repeatedly refers to the charges collected by NFPD as a "levy" or an "assessment" by NFPD upon the United States. *See* Br. in Opp. 8 (NFPD "sought to levy"); *id.* at 9 (by "assessing the fee . . . NFPD levied an ad valorem property tax"); *id.* at 14 ("a locality may not, as NFPD has here, assess an ad valorem tax"). The Government is forced into this characterization of the charges collected by NFPD because it acknowledges that under this Court's decisions, the *only* prohibition under the intergovernmental tax immunity doctrine that it can invoke is that "a State may not, consistent with the Supremacy Clause . . . lay a tax 'directly on the United States.'" *Washington v. United States*, 460 U.S. at 547.[1]

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[1] The Government also refers to the anti-discrimination prong of the doctrine in the opening paragraph of its argument, Br. in Opp. 7, but it never takes issue with NFPD's argument that there is no discrimination here against the United States. *See* Pet. 13 n.6.

Like the Ninth Circuit, Pet. App. 6a-7a, the Government's predicate for analogizing the charges here to a tax is that they were calculated on the bases of the rate that NFPD might have used to tax the property if it were within the NFPD. Br. in Opp. 9. However, the calculation of NFPD's fee for services to the Navy is not the "levying," "laying," or "assessment" of a tax; it is a contractually-agreed upon price. If the Navy (or now the Coast Guard) believed that the price was too high, it could have bargained for a different price, found a different provider of the service, or provided the service itself. *See* Pet. App. 18a (district court's holding that, for this reason, the NFPD's action "does not have the compulsory character of a tax").

Charges under a contract are not "levies" of taxes imposed by a sovereign on an entity that is forced to accept them. Indeed, it is the potential clash of sovereigns that arises when a State asserts the power to *force* the Federal Government to pay a tax – which did not happen here – that lies at the heart of the intergovernmental tax immunity doctrine in the limited circumstances where it still applies. *United States v. New Mexico*, 455 U.S. 720, 735 (1982). Plainly, the Ninth Circuit extended the intergovernmental tax immunity doctrine beyond the tight boundaries established by this Court's modern cases when it held that agreed-upon payments pursuant to contracts are unconstitutional.[2]

3. The Government's suggestion that this Court should deny certiorari because of the independent "state-law grounds" that purportedly sustain the decision below invites

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[2] The Government attempts to distinguish *Washington* on the ground that it did not involve a tax laid directly on the United States. Br. in Opp. 10-11. In this case, however, not only is there no tax laid directly on the United States – there is no tax (*i.e.*, no "enforced contribution") at all.

the Court to leave as the law of the Ninth Circuit a deeply flawed decision in an area of constitutional law that has always been of great concern to this Court. While there is good reason to believe that the Ninth Circuit concluded that there were no independent state-law grounds that could sustain the decision below, *see* p. 2, *supra*, this Court need only correct the Ninth Circuit's manifest error in deciding the constitutional issue and remand to allow the court of appeals to determine the state law question. *See South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 511 (1986) (remanding for consideration of a state law issue not reached by the court of appeals because that court "is in a better position to evaluate such an issue of state law than we are") (citations omitted). *See also Hutchinson v. Proxmire*, 443 U.S. 111, 123 (1979) ("assum[ing] that the Court of Appeals is as familiar as we are with the general principle that dispositive issues of statutory and local law are to be treated before reaching constitutional issues," and deciding a constitutional issue based on "an indication that the Court of Appeals would not affirm the state-law holding") (internal quotation and citation omitted).[3]

The Court should similarly not be deterred from granting the petition on the grounds that this case entails "unique circumstances." Br. in Opp. 8, quoting the court of appeals' opinion. The circumstances are "unique" only in the sense that a worst-case example of the misapplication of a constitutional principle is always "unique." The "unique" circumstances here are that the Federal Government has for the first time sought to escape contractually agreed-upon

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[3] The Government's brief in opposition to certiorari makes no effort to answer NFPD's objections to the district court's state-law holdings, which were acknowledged by the district court itself. *See* Pet. 6 n.3.

payments by re-characterizing them as a "tax." It is also "unique" because the Government did not take this position until 20 years after it entered into the contract.

4. Strangely, the Government devotes more than two pages of its opposition (pp. 11-13) to a discussion of 15 U.S.C. § 2210, apparently for the purpose of rebutting an argument that the statute "waive[s] federal immunity from state and local taxation" for "taxes that support local fire services." Br. in Opp. 12-13 & n.3. But NFPD never argued that § 2210 *is a waiver* of immunity. Instead, it referred to § 2210 for the very different purpose of illustrating that, while "Congress *can confer* an immunity from taxation" (emphasis added) – a factor which this Court has recognized in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851 (1989), as a reason for adhering to a narrow constitutional doctrine of federal immunity from state taxation, *see* Pet. 13-15 – it did not do so in § 2210. To the contrary, Congress recognized that local governments could receive "taxes or payments in lieu of taxes" for such service wholly outside the additional reimbursement potentially available under that section.

5. The Government's only answer to NFPD's argument based on *Printz v. United States*, 521 U.S. 898 (1997), *see* Pet. 16-19, is that the Federal Government does not "command" the NFPD to provide it with free fire services, but instead "the State of California has imposed on NFPD the obligation to provide fire services *within its District*." Br. in Opp. 14-15 (emphasis supplied). Of course, this argument begs the question whether NFPD complied with state law when it deannexed Hamilton Field. If, as the Ninth Circuit assumed, NFPD's deannexation complied with state law, the Federal Government has indeed "commanded" NFPD to provide free fire services because nothing in state law requires it to provide such services *outside its District*.

The Government's answer to NFPD's argument that it has an "ad infinitum" obligation to provide free services to the United States under the court of appeals' decision is similarly flawed. *See* Br. in Opp. 14, asserting that NFPD's obligation arises under "state, not federal, law," and that NFPD has a "state-law duty to provide those services to federal properties *within its borders*." (emphasis supplied).

CONCLUSION

For the reasons stated above and in the petition, this Court should grant the writ of certiorari sought in the petition.

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